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6/25/92

SIMULCAST PAPER--EXECUTIVE SUMMARY

There are both legal and policy issues associated with the Commission's application of a simulcasting requirement to broadcasters using a second channel for advanced television.

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Legal issues.

JUL - 1 1992

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A strict simulcast requirement makes it easier to justify giving the second channel to existing broadcasters only, for the first two years. To the extent that different programming is permitted on the second channel, it is more difficult to close out new applicants in the initial round.

Perhaps the requirement that the second channel be returned to the Commission ultimately may solve this problem. Existing broadcasters will end up with just what they started with--only one channel. On the other hand, the FCC cannot sustain its eligibility conditions on the notion of preserving certain broadcasters. Just as the original must carry rules were invalidated in part, on grounds that they were crafted to protect individual broadcasters rather than broadcasting, similar problems would arise here. The issue is not who retains the broadcast license (no license can be guaranteed for 15 or more years) but that over-the-air broadcast service occupying a given proportion of the radio spectrum will persist. As a practical matter, moreover, it may be more difficult to require the return of one of two channels where the respective programming is different. However, if the Commission announces in advance, as it has, that the first (or NTSC) channel must be returned, it would seem to have the authority to enforce this policy. Moreover, in those instances in which an existing broadcaster chooses to forego seeking a license to also operate in ATV and that license is issued to another entity, the announced NTSC channel conversion policy would stand.

Moreover, the FCC has justified awarding the second channel initially to existing broadcasters only on several other public interest grounds, including the experience of existing broadcasters, the fact that existing broadcasters have considerable investment in the present system and the fact that broadcasters already have and will continue to invest in and take substantial business risks toward the development of advanced television. Finally, opening up the spectrum allotted to ATV to a comparative processing would unduly delay ATV implementation.

On the other hand, however, the FCC's rationale may be flawed in several ways. The rationale may have merit with regard to experienced broadcasters, but not to permittees or others who have done no more than file for a construction permit. Without question low power television licensees would better fit the ATV license preference rationale and yet they are not in fact

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eligible. What's more, in many instances, these broadcasters will be put out of business to accommodate the ATV spectrum needs.

First Amendment.

It may be argued that a simulcast requirement is a content-based regulation that would inhibit the program decisions or existing broadcasters' ATV operations only. It can only be justified under the First Amendment if it is the least restrictive means necessary to achieve the overriding public interest goals articulated by the Commission in promulgating the requirement. If there is a less restrictive alternative whereby the Commission's public interest goals can be achieved, that alternative should be preferred to the alternative that has greater impact on protected speech. If, for example, readily-available, down-converters are freely provided by ATV broadcasters to every TV household for each and every NTSC set in the home in order to provide broadcasters' ATV feed for NTSC-only viewers, a simulcast requirement may be seen as overly restrictive in First Amendment terms. Just as the Commission has found an A/B switch option less restrictive than mandatory carriage requirements for cable, there may be other, less restrictive alternatives to simulcast requirements that could achieve the public interest goal of protecting service to NTSC viewers throughout the transition to ATV. Indeed if down-converters are supplied for all NTSC receivers, there is no need for an ATV transition period of more than a few years--once the ATV channel is operational the FCC may reclaim the NTSC spectrum.

On the other hand, it is just as likely (if not more) that the simulcast requirement would not be seen as a content-based regulation since it gives the broadcaster total freedom to provide whatever content he/she deems appropriate. The FCC has specifically found that the grant of a second channel for ATV is not "the start of a new and separate video service," but a means to achieve "a major advance in television technology." So by its nature it is to promote ATV. And the licensing eligibility restrictions are based on that distinction (ergo the exclusion of low power licensees). The simulcast requirement means only that both pieces of the technological transition must be alike.

Practical/policy issues.

A major policy goal for the Commission is prevention of the disenfranchisement of NTSC receiver owners, if broadcasters are permitted to use this transition to a new technology as a vehicle for offering a service that even if technically intended to be received by the public, it knowingly is not expected to be received by the public at large. Indeed if the FCC's concern

over excluding NTSC homes was not an issue, it could have taken an entirely different approach to the introduction of ATV and, especially to the licensing of the service. Yet another concern is that absent simulcast requirements, broadcasters may begin to devote their best program efforts to ATV development, at the expense of NTSC programming offerings. At least in the initial phases of ATV implementation, perhaps broadcasters most likely will continue to provide quality NTSC programming whether or not they are required to do so, because ATV receiver penetration will still be low. Initial ATV receiver purchasers will most likely keep their NTSC receivers as well, and program enhancements in ATV will drive ATV receiver penetration. Such enhancements could include the improved audio and video quality ATV will deliver. It has been suggested by some that pre-released ATV programs, multiple-plays of ATV special productions, either on a pay or free basis, and perhaps some ATV-only programming might also drive ATV receiver penetration.

If NTSC-only viewers were equipped with down-converters, a requirement that the ATV enhancements also be available to them through simulcasting would be less necessary. On the other hand, if it is argued that highly differential programming will be the engine behind ATV receiver penetration, the mandated availability of ATV down-converters would retard that ultimate transition to ATV.

To the extent that two different program channels, NTSC and ATV, develop, it will be more difficult to enforce the reversion of the second channel, as viewers will get used to having both channels. On the other hand, broadcasters will have to make significant investments on this new technology without the promise of additional revenues, particularly if they must provide the same programs at the same time on both channels. Some flexibility to experiment with the new technology could enable broadcasters to derive interim revenues, as well as to continue to improve ATV. On the other hand, if broadcasters are unwilling to make significant investment in the new technology about new revenue opportunities, the FCC need only open up the license eligibility requirement to others, such as low power licensees or others more willing to take financial risks.

Other media.

Other video media, particularly to the extent that they retransmit broadcast signals, are reliant on the Commission's decisions regarding the broadcast ATV transmission standard and the extent of any simulcast requirement. While there is no mandatory transmission standard for non-broadcast media and they currently are not required by law to retransmit broadcast signals, to the extent that the same programs are available on

the ATV and NTSC channels, those media that retransmit broadcast signals will not have to carry both channels in order to satisfy their viewers. It is of great significance, moreover, that both the legislative proposal adopted by the U.S. Senate (S. 12) and the bill moving through the House of Representatives (H.R. 4850) provide that mandatory cable carriage rules be adjusted once ATV standards are in place.

Flexible definition of simulcasting.

Some flexibility in the definition of "simulcasting" would address concerns by some over early program availability. Others feel confident that up converting NTSC programs to the ATV format ought to allay those concerns. Time shifting within a day or other, longer period, has been suggested as an attractive vehicle to spur ATV receiver penetration. To the extent that there is not a 100% simulcast requirement, multiple-plays at different times of ATV productions, as well as pre-release, it is argued might stimulate audience demand. Exempting commercials and programs of under a specified length from any simulcast requirement also might make implementation of ATV easier for broadcasters. But, again, the up converting of NTSC programming would be even easier and would not position NTSC homes as "have nots" in the world of ATV: it is the technology that is being changed by the FCC, not programming.

Conclusion.

In sum, simulcasting the programming on both NTSC and ATV channels will protect NTSC viewers during the transition to ATV until such time as ATV becomes the only authorized over-the-air broadcast service.

Introduction

In the Second Report and Order and Further Notice of Proposed Rulemaking in Mass Media Docket 87-268 (Notice), the commission states that it will require 100% simulcasting of NTSC and ATV programming "at the earliest appropriate point," for three stated reasons:

1. Protection of service to NTSC viewers;
2. Minimal reliance on the ATV channel as a separately programmed service will facilitate reclamation of the reversion channel at the earliest possible opportunity: and
3. 100% simulcasting is expected to give impetus to ATV receiver penetration by eliminating the need for dual-

mode receivers and thereby helping to lower the cost of
ATV receivers

The Commission tentatively concludes that a 100% simulcasting requirement should be imposed four years after the five-year application/construction period. It seeks comments as to whether it should phase in the simulcasting requirement, that is, require simulcast of 50% of each day's programming to start two years after the five year period, with a 100% simulcast requirement to commence another two years thereafter. The Commission also seeks comments on alternative simulcasting schedules, including an earlier adoption of a 100% simulcasting requirement, if this were technically feasible. Comment is also sought on whether broadcasters would, regardless of technical feasibility, need "some reprieve" from a 100% simulcast requirement, even after the initial application/construction period, to explore the creative potential of ATV, attract viewers to ATV and assure their ability to recoup their investment in ATV implementation.

Additionally, the Commission seeks comment on utilizing a flexible definition of simulcasting in order to afford broadcasters flexibility in developing ATV technology, including:

- A. Requiring that the same programming overall be broadcast in both ATV and NTSC, but permitting time shifting, either within the same 24 hour period or otherwise.
- B. Defining "the same program" as "consisting of the same underlying material, "but allowing variances in content, recognizing the special natures of ATV and NTSC, including different aspect ratios, angles, numbers of cameras or commentary (e.g., in connection with different camera angles).
- C. Excluding commercials and promotions from any simulcast requirement.
- D. Excluding programs below some minimum length from any simulcast requirement, e.g., applying it only to programs of more than 15 minutes in duration.
- E. Finally the Commission asks whether the phase in proposed above would be necessary, should it adopt a flexible definition of "same program," including the above elements.

The Commission also concludes that the ATV channel must be used from the outset to deliver ATV programming, including programs produced in film and converted directly to ATV, programs originally produced on tape in ATV, and programs produced live in ATV. The Commission does not envision permitting on the ATV channel up-converted NTSC programs that are different from the NTSC programs delivered on the NTSC channel, although presumably delivery of the same NTSC programs, up-converted, would meet any simulcasting requirement.

The Commission seeks comment from electronics manufacturers on the relationship between any simulcast requirement and the rate of ATV receiver penetration, as well as the availability and cost of up-conversion equipment, down-conversion equipment for home use and dual-mode receivers. The Commission is particularly interested in the effect of the various simulcast alternatives on consumer interest in ATV and ATV receiver penetration. Finally, comment is sought from programmers on a timetable for availability of ATV-capable programming.

There are two separate, but interrelated issues raised in connection with the simulcast options. The definition of simulcasting, i.e., how flexibly broadcasters may program while still meeting the definition of simulcasting, and the extent of and timetable for simulcasting. These are related in that to the extent that a flexible definition of simulcasting is embraced, an earlier-imposed, higher percentage of simulcast programming requirement probably becomes more feasible and less onerous for broadcasters.

Discussion

Definition of Simulcasting

The FCC proposes to define "same program" as "one which has its basis the same underlying material." Such a definition would permit variances to accommodate the special nature of ATV or NTSC, such as different aspect ratios, angles, or numbers of cameras or commentary in connection with different camera angles. "Program" might also be defined to exclude commercials and promos. Programs of some minimum length also might be excluded. The Commission suggests that such definitional flexibility could alleviate concerns that a simulcasting requirement would raise First Amendment problems or have a chilling effect on program content.

A certain amount of flexibility, with the "definition of same underlying program," would appear to be both necessary and desirable to accommodate basic differences in NTSC and ATV. If editing techniques such as panning and scanning or letter-boxing

are required to transfer the same underlying program material from one aspect ration to another, it would be difficult to consider these materials "different programs." As a practical matter, the less rigid the definition, the less onerous compliance with a simulcast requirement is likely to be for broadcasters.

The Commission also suggests permitting time-shirting of ATV and NTSC program within the definition of "same program." Viewers would have an opportunity to receive the same program on both channels, but they would be able to see it at different times. As the Commission recognizes, it will be up to broadcasters to "explore the creative potential of the ATV mode and attract viewers to ATV." As we have seen with the proliferation of home satellite dishes, especially in areas that already can receive the major broadcast signals off the air and those that are cabled, consumers are willing to invest in high-end receiving capability to enjoy otherwise-unavailable programs. It is not clear that the difference between NTSC and ATV Quality alone will put ATV receiver penetration: to the extent that ATV is permitted to bring, if not diverse program offerings, at least novel viewing modes to over-the-air television, ATV receiver penetration may be stimulated. On the other hand, because the FCC has specified that the award of an ATV channel is not a license to begin a new program service, but only an opportunity to develop a new technology, these assertions would draw into question the Commission's initially assigning ATV channels to existing broadcasters only.

Within the rubric of time shifting, broadcasters may wish to pre-release ATV productions, perhaps on a pay-per-view basis, as well as to provide multiple plays at different times of ATV productions. It would be extremely difficult, however, to reconcile these ideas (and most especially any pay or pay per view services) with either the notion that ATV is not a new programming service or that NTSC only households not be disenfranchised. Moreover, investments in programming that is not viewable by NTSC homes will certainly have an impact "relegated" to NTSC. And finally, to the extent broadcasters are permitted to so differently program the ATV signal the FCC will encounter difficulties in responding to allegations that this situation is evidence of an enormous spectrum _____ worth billions of dollars - all at little perceived benefit of today's television households. Nonetheless some would agree that in order to develop the ATV as the new, and eventually sole, television broadcast service, not just because the initial investment in ATV transmission equipment (not to mention ATV programming and/or production equipment) will be costly without producing revenues, but also because the value ATV will add to television is unknown as yet and must be explored, flexibility as

to the definition of simulcasting should be considered by the Commission, consistent with the public interest goal of preserving NTSC service for remaining NTSC receivers.

Simulcasting Options.

There are various options that the Commission might consider in addressing the simulcast issue, however flexible the definition of simulcasting adopted.

- A. 100% simulcasting requirement could be adopted earlier than four years after the five-year application/construction period.
- B. The 100% simulcasting requirement could be phased in on a 50% basis every two years during the four years after the five-year application/construction period, as the Notice suggests.
- C. The Commission could defer a decision on when to set a timetable for 100% simulcasting and review the state of the industry after the five-year application/construction period, considering the level of ATV receiver penetration and the development of ATV programming at the time.
- D. Finally, the Commission could defer its decision on whether to adopt a 100% simulcasting requirement until after the five-year application/construction period, or even until some later date, and assess the state of the industry at that time, including factors such as ATV set penetration and the development of ATV programming.

There may be something to be said for the Commission allowing the industry and itself to have some real-world experience with the transition to ATV technology before imposing rigid requirements whose affect on the proliferation of advanced television can not be predicted.

On the other hand, the Commission has stated: "ATV represents a major advance in television technology, not the start of a new and separate video service." The basis for the Commission's decision to grant additional spectrum to existing broadcasters only was to facilitate the transition from NTSC to a new, incompatible ATV technology, by permitting the broadcast industry to keep pace and compete with other video providers on this new technological playing field.

By authorizing two channels, the Commission states that its goal is not to create a new programming service, but to achieve

an orderly transition to an improved technology, while continuing NTSC service along with ATV introduction in order to protect consumer investment in existing NTSC equipment, so consumers are not forced to purchase new ATV receivers in order to continue to enjoy high-quality over-the-air television programming. Once ATV becomes the prevalent medium, broadcasters will be required to convert entirely to ATV and surrender one of their two channels. Allowing the provision of different programming for ATV viewers could prematurely disenfranchise the NTSC viewing public. Broadcasters might be incented to divert resources from NTSC programming to the new ATV programming providing NTSC with increasingly inferior quality programming throughout the transition period and perhaps forcing NTSC viewers to make additional purchases of equipment in a dying technology, i.e., ATV down-converters, just in order to receive decent local broadcast programming. The Commission is fearful that the ready availability of low cost down-converters will inhibit the conversion to full ATV implementation. More significantly, unless down-converters were mandated at no charge for all NTSC householders the FCC would be party to the creation of a "have not" class among over-the-air broadcast viewers -- the very disenfranchised group it has sought to avoid creating.

On the other hand, those who purchase ATV receivers early on will probably retain their NTSC sets as well; or they will purchase integrated receivers, so that they can continue to receive NTSC as well as ATV.

It also could be argued that permitting broadcasters to program the ATV channel independently of the NTSC channel might jeopardize the goal of fostering expeditious transition to ATV and promoting spectrum efficiency. That is, broadcasters might be incented to delay the ultimate transition to ATV, so that they could continue to operate two program channels indefinitely. Simulcasting will hasten the freeing up of the reversion spectrum, as well.

Abandoning the simulcast approach or so loosely defining simulcasting as to permit highly differentiated programming on the ATV channel for an indeterminate time may undermine the legal rationale for giving ATV channels to existing broadcasters only as opposed to allocating them on a comparative basis, as the Ashbacker ruling suggests may be required. The underlying premise for awarding broadcasters the second channel on an interim basis is to enable them to transition from a single NTSC channel to a single ATV channel while continuing to meet their obligation to serve viewers. New ATV programming could presumably be provided by any qualified broadcast licensee, making it difficult to sustain preferential treatment for incumbent licensees.

On the other hand, if ATV channels were initially awarded to new applicants, as opposed to existing broadcasters, NTSC viewers might well be immediately disenfranchised. The Commission could require existing broadcasters to continue to broadcast in NTSC only, while fostering ATV development by its new ATV licensees. Although existing broadcasters might well choose to convert to ATV, as well, their license is for a short-term use of the public spectrum; not a license in perpetuity. Nothing would prohibit the FCC from beginning to simply phase-out the NTSC service as license terms expire and ATV penetration grows. As it is, existing broadcasters are being given the opportunity to invest in the future technology. It may mean putting substantial sums in a new, untried technology and begin broadcasting in a new format without any assurance that viewers will purchase receivers to watch it, and, indeed, that there will be any additional revenues derived therefrom. Broadcasters have indicated that they are eager to avail themselves of this opportunity and take this chance; indeed, those that are not simply need not apply for a second channel, but presumably could continue NTSC broadcasting on their original channel, and seek authority later to convert to ATV at the date specified by the Commission if an ATV channel allotment is available at the time.

It is unknown now whether consumers will purchase ATV receivers based upon the enhanced picture and sound quality it can provide, or whether the promise of enhanced overall program offerings will be necessary to provide an added incentive. Some have said that at some point during the transition, broadcasters will have to divert some of their resources to ATV programming at the expense of NTSC, until and unless they figure out how to derive additional revenues from ATV. Others would point out that there is no such necessity: simulcasting permits both ATV and NTSC viewers to enjoy the fruits of ATV programming investments. Moreover, as the Commission has emphasized, the obligation to serve NTSC viewers should not be sacrificed to ATV development.

On the other hand, it has been suggested that there may be legal perils associated with a strict program-related requirements, unless it can be shown to be the least restrictive means to achieve an otherwise unachievable public interest goals. The Commission historically has avoided regulations affecting program content on account of its First Amendment sensitivity. Content-based regulations must be limited to the minimum necessary to achieve over-riding public interest goals. Imposing a 100% simulcast requirement, if it is viewed as a "program-related" requirement, must be shown to be the least restrictive means necessary to achieve the goals outlined by the Commission and paraphrased on page 1 above. The simulcast requirement may not amount to a program-related requirement at all. Remembering

that ATV is not a new program service but a new technology for existing services, the simulcast obligation insures there is no misunderstanding and serves, further, as a fundamental underpinning of the FCC's licensing arrangements for ATV.

If the Commission rules that it will not permit broadcasters to retain the second program channel beyond a date certain, that ruling should be enforceable with or without requiring total redundancy on both channels during the transition. The fact that the dual-channel operation is only temporary should alleviate concerns under Ashbacker. The channels allotted to ATV will be available to other applicants shortly after the initial assignment period of two years, and the Commission has articulated several reasons why it believes limiting initial eligibility to existing broadcasters only will be in the public interest:

1. existing broadcasters have the know how and the experience to implement ATV;
2. existing broadcasters have invested considerable resources in the present system;
3. existing broadcasters will be making considerable additional capital investments in ATV and will be taking substantial business risks in ATV development; and
4. the broadcast industry is currently investing substantial resources in the Advanced Television Test Center to develop and perfect the new technology.

In short, if the Commission strictly adheres to its promise that the second channel must be returned as a date certain, the Ashbacker concern will be diminished, if not eliminated. The Commission already has found that the allocation of ATV channels to existing broadcasters only is in the public interest because it is the means most likely to spur the development of ATV. But the Commission already has found, too, that 100% simulcasting is a "must".

As the Commission has recognized as well, broadcasters ought to be able to experiment creatively with advanced television, both in order to fund their initial investment in ATV and to maximize the medium's transmission capabilities. To the extent that broadcasters are permitted to provide the value-added suited uniquely to ATV, receiver penetration will likely be stimulated and additional advertising revenues available. Although some might support pay-per-view or other types of subscription operation which may be appropriate for certain ATV productions, such as sporting events; at least as powerful an argument would

support the opposite conclusions. Revenues from such activities may be an attractive means to fund dual-channel operation and maintain service to both NTSC and ATV viewers. But engaging in such activities is clearly part of offering a new video services -- the very thing that ATV licensees cannot do.

Another possible means of producing additional revenues would be for broadcasters to be permitted to use for ancillary purposes excess data capacity that is not required for ATV transmission but otherwise would remain fallow in the ATV channel, both during non-operation time (such as overnight) and during ATV transmission on a non-interfering basis. There is precedent for permitting non-interfering ancillary uses in the NTSC service, e.g., SAP, SCA, VEI. This ancillary use would not affect any simulcast requirement one way or another, and it would maximize use of the spectrum.

Initially, when ATV receiver penetration is low, NTSC program offerings are not likely to suffer in relation to ATV. Even as ATV penetration increases, broadcasters still will be likely to produce programming that is largely nonpictorial in nature, e.g., news and public affairs, in NTSC until their studio production facilities have been completely converted. Such programming is considered to be part of each licensee's public interest obligation and is likely to be up-converted and simulcast whether there is a specific obligation or not.

Although the Commission regulates non-broadcast video media to a far lesser extent than television, and although the current proceeding is designed to set a transmission standard that is only mandatory for broadcasters, other video media are reliant upon the broadcast environment for their own survival and success. Many of them retransmit broadcast programming, for example. For this reason, the Commission might wish to take them into account in any decision it makes on whether broadcasters must simulcast ATV and NTSC programs.

The cable industry has cooperated in the development of a broadcast-compatible ATV standard, even though such a standard may not represent the optimal, or most efficient, or most readily available approach for cable transmission. Cable's cooperation in this process -- and its willingness to forgo its own development of HDTV technology -- has been premised on the Commission's proposal that there be a smooth and expeditious transition from NTSC broadcasting to HDTV. Abandonment of a simulcast approach may, for reasons stated above, delay and disrupt the transition.

Conclusion

While the Commission has tentatively concluded to require simulcasting of ATV and NTSC programming, as the above discussion indicates, there are countervailing factors on both sides of the issue that the Commission may wish to consider as it proceeds with its deliberations.